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SUPREME COURT, U.S.

NO. 80-6127

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

ROBERT HENRY McDOWELL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE §15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

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IN THE

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February Term, 1981

NO.80-6127

ROBERT HENRY McDOWELL,

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v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Robert Henry McDowell and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Johnston County, North Carolina. In an opinion reported in State v. McDowell, ____ N.C. ____, 271 S.E. 2d 286 [No. 80 - Fall Term], the Supreme Court of North Carolina affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE §15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17. . . .A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed

in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix C of Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

The Respondent adopts as its own, as if fully set out herein, the facts stated by the Supreme Court of North Carolina in its opinion in State v. McDowell, ____ N.C. ____, 271 S.E. 2d 286 [No. 80 - Fall Term], a copy of which is attached to the Petition for Writ of Certiorari as Appendix A.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. FAILURE TO RAISE THE FEDERAL QUESTION FOR TIMELY REVIEW BY THE NORTH CAROLINA SUPREME COURT.

The Respondent, State of North Carolina, respectfully submits that the Petitioner failed to raise and fairly present, in the Supreme Court of North Carolina, the constitutional issue that he now seeks to have this Court decide. Rules 28(a) and (b) of the North Carolina Rules of Appellate Procedure [287 N.C. 671 (1975)] indicate that any question of law not presented and discussed by defendant in his brief will be deemed abandoned. The North Carolina Supreme Court has ruled that defendant waives any error, including constitutional error, when he fails to assert the same on direct appeal of his case to the appellate courts of this State. State v. White, 274 N.C. 220 (1968) [See also State v. Browder and Johnson, 293 N.C. 259 (1977); State v. Crowder, 293 N.C. 259 (1977); State v. Jackson, 293 N.C. 260 (1977); State v. May, 293 N.C. 261 (1977); and State v. Riddick, 293 N.C. 261 (1977)].

It is essential to the jurisdiction of this Court under §1257 that a substantial federal question has been properly raised in the State court proceedings. For the purpose of certiorari under subsection (3), the validity of a State statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "specifically set up or claimed." As stated in Mr. Justice Harlan's dissent in Amalgamated Food Employees' Union v. Logan Valley Plaza, 391 U.S. 308 at 334 (1968), in determining whether a question was "specifically set up or claimed" within the meaning of §1257(3), "it is relevant and usually sufficient to ask whether petitioners satisfied the State rules governing presentation of issues." And the proper method of raising the federal question is dependent upon the particular State practice, at least as long as the litigant thereby has a reasonable opportunity to have such an issue heard and determined. Michel v. Louisiana, 350 U.S. 91 (1955); Parker v. Illinois, 333 U.S. 571 (1948); Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U.S. 447 (1936); Central Union Telephone Co. v. Edwardsville, 269 U.S. 190 (1925).

Once a substantial federal question has been properly framed, it becomes important that it be raised at the proper point in the State court proceeding. Beck v. Washington, 369 U.S. 541 (1962); Godchaux Co. v. Estopinal, 251 U.S. 179 (1919). In Mr. Justice Harlan's words: "The rule that in cases coming from State courts this Court may review only those issues which were presented to the State court is not discretionary but jurisdictional." Amalgamated Food Employees' Union v. Logan Valley Plaza, supra. It has long been established that this Court is vested with no jurisdiction unless a federal question was raised and decided in the State court below. Cardinale v. Louisiana, 394 U.S. 437 (1969); Crowell v. Randell, 35 U.S. (10 Pet.) 285 (1836).

The jurisdictional factor is especially significant where the highest State court fails or refuses to pass expressly

upon the federal question. In that situation, the party invoking this Court's jurisdiction has the burden of showing that he properly raised the question so that the State court's failure to deal with it was not for want of proper presentation. This Court has stated many times that when "the highest State court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969). And Rule 21(1)(h) states that the petitioner seeking review of a State court decision in this Court, in meeting this burden, must "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . ."

The litigant must follow the State procedures in raising the federal question. Any failure to do so is fatal. The federal question must be pursued to the highest State courts and must be pursued in the manner and with the degree of specificity required by the State Rules of Practice. See Beck v. Washington, supra. "Without doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the State law and practice in this regard are no less applicable where federal rights are in controversy than when the case turns entirely upon questions of local or general law." John v. Paullin, 231 U.S. 583 (1913).

Thus, a waiver will be implied if the litigant fails to obey a State rule of procedure requiring the federal constitutional issues to be raised in the trial court and again for review directly in the State Supreme Court. Parker v. Illinois, supra. A waiver has also been found where the litigant fails to list the federal issue among the "assignments of error" in his brief filed in the State Supreme Court or to argue the

point in that brief. Beck v. Washington, supra. And where a party fails to raise a constitutional issue in the "statement of the questions presented" in its brief to the State Supreme Court, as required by court rule in order for the issue to be considered, and where the constitutional issue was not otherwise argued in the brief or even mentioned in the State court opinion, this Court will decline to consider that issue. Amalgamated Food Employees' Union v. Logan Valley Plaza, supra.

The Respondent respectfully submits that the Petitioner, neither in his brief [Appendix A - Brief of McDowell filed in the North Carolina Supreme Court], nor on oral argument to the Supreme Court of North Carolina, suggested that there was a constitutional basis for him to receive a new trial based upon Phase II - Sentence Determination. The Respondent respectfully calls to this Court's attention the opinion below, Petitioner's Appendix A, at page 14, wherein the North Carolina Supreme Court stated:

> "Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those which were submitted. We conclude that the trial court did not err in this respect. See State v. Barfield, supra; State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979)."

In Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) this Court stated:

> "In order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L. Ed. 3, 5-6, 66 S. Ct. 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, e.g. Bailey v. Anderson, supra;

Chicago, I. & L. R. Co. v. McQuire, 196 U.S. 128, 131-133, 49 L. Ed. 413, 415-417, 25 S. Ct. 200 (1905)."

In the concurring opinion of Mr. Justice White in Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), it was stated:

> "We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother Rehnquist points out, the Court stated in Street v. New York, 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), that 'when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary.'
>
> Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses."

The Respondent respectfully submits that Petitioner has not carried the burden of demonstrating to this Court that under the applicable state law his claim was properly before the Supreme Court of North Carolina and was rejected, although silently, by the affirmance of the judgment and that since he has failed to do so this Court should not now entertain and decide the federal question that he now presses.

In the dissenting opinion of Mr. Justice Rehnquist in Chambers it is stated:

> "28 U.S.C. §1257 [28 USCS §1257] provides in pertinent part as follows:
>
> > 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> >
> > * * * *
> >
> > (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed

under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'

We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a jurisdictional limitation, Cardinale v. Louisiana, 394 U.S. 437, 438, 22 L. Ed. 2d 398, 89 S. Ct. 1161 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort:

> 'Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.' Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L. Ed. 1149, 17 S. Ct. 709 (1897).'"

In Chambers, Mr. Justice Rehnquist further stated in his dissent:

> "In Bailey v. Anderson, 326 U.S. 203, 90 L. Ed. 3, 66 S. Ct. 66 (1945), the petitioner argued in this Court that a state court condemnation award that failed to include interest from the date of possession denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment. This Court noted that in the state circuit court petitioner had requested that the award include interest from the date of taking, and that the circuit court without explanation had rejected this claim. But this Court went on to say:
>
> > 'But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest.' 326 U.S. at 206, 90 L. Ed 3."

In Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509, Mr. Justice Brennan, speaking for the Court, stated:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' Ex parte Royall, supra, at 251,

29 L. Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L. Ed. at 766; Davis v. Burke, 179 U.S. 399, 401-403, 45 L. Ed. 249, 250-251, 21 S. Ct. 210 (1900)." (Emphasis added)

In Chambers, Mr. Justice Rehnquist in his dissent concluded by stating:

"This Court under the Constitution has the extraordinarily delicate but equally necessary authority to review judgments of state courts of last resort on issues that turn on construction of the United States Constitution or federal law. But before we undertake to tell a state court of last resort that its judgment is inconsistent with the mandate of the Constitution, it behooves us to make certain that in doing so we adhere to the congressional mandate that limits our jurisdiction. Believing as I do that petitioner has not complied with 28 U.S.C. §1257(3) [28 USCS §1257(3)], I would dismiss the writ of certiorari."

See also Edelman v. California, 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1953), and Irvine v. California, 347 U.S. 128, 98 L. Ed. 561, 74 S. Ct. 381 (1954).

The Respondent respectfully submits that the Petitioner, having failed to timely raise this issue in the State appellate court, has waived the relief he now seeks by this petition.

II. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE JURY PUT IN WRITING ITS FINDINGS OF OTHER CIRCUMSTANCES ARISING FROM THE EVIDENCE WHICH THE JURY DEEMS TO HAVE MITIGATING VALUE AND THE JURY IS NOT GIVEN UNRESTRAINED AND UNGUIDED DISCRETION TO RECOMMEND THAT THE DEFENDANT BE SENTENCED TO DEATH PURSUANT TO THE PROVISIONS OF NORTH CAROLINA GENERAL STATUTE §15A-2000.

A. In State v. Johnson, 298 N.C. 47, 72, 257 S.E. 2d 597, the Supreme Court of North Carolina held that any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted to the jury in writing. Justice Exum, speaking for the Court, stated:

> "If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the 'any other circumstance' provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586. In Lockett Ohio's death penalty statute was found unconstitutional under the Eighth and Fourteenth Amendments because the Ohio sentencing authority could consider only three mitigating factors and none other. The Supreme Court concluded, id. at 604-05, 608:
>
> > 'that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases . . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
> >
> > 'There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite

> of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
>
> . . . .
>
> 'To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.' (Emphasis original.)

A footnote to the quoted sections of Lockett provides, 'Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumstances of his offense.' Id. at 604 n. 12.

Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.

Thus we are satisfied that our legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as we believe they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

Since, however, defendant made no specific request to include possible 'other mitigating circumstances' on the written verdict form submitted to the jury and, likewise, made no timely request to include defendant's good character as a mitigating circumstance, we find no error in the actions of the trial judge in failing to do these things."

The Petitioner did not tender to the trial court a timely request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and made no

request that the judge instruct the jury to write out "other mitigating circumstances" which it found may have mitigating value on the written verdict form. (R.p. 119) The Petitioner did not bring forward and argue in his brief (Respondent's Appendix A) before the Supreme Court of North Carolina the failure of the trial judge to include possible "other mitigating circumstances" on the written verdict form submitted to the jury nor did he bring forward and argue in his brief before the Supreme Court of North Carolina the failure of the trial judge to instruct the jury to write out "other mitigating circumstances" which it found may have mitigating value on the written verdict form.

The Respondent submits that to require the jury to submit in writing "other mitigating circumstances" would inhibit the jury and, in effect, "bridle" them from considering "other mitigating circumstances" which they may consider and deem to have mitigating value in making their recommendation with respect to punishment.

B. G.S. §15A-2000 was considered and reviewed by the Supreme Court of North Carolina in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510, cert. denied, ____ U.S. ____, 65 L. Ed. 2d 1137, 100 S. Ct. 3050. Justice Britt, speaking for the Court, stated:

> ". . . We conclude that the present North Carolina death penalty statutes overcome the problems identified in Woodson.
>
> First, the determination of guilt is entirely divorced from the imposition of punishment. Though the same jury that made the determination of guilt may make the determination of punishment, it makes that determination at a different time, subject to a different set of instructions from the trial judge. Therefore, the issue of jury nullification of the instructions of the court by refusing to convict of the capital offense is diffused. In making the finding of guilt or innocence, the jury now does not invariably weigh the probable punishment. In addition, the evidence that it considers in the punishment phase of trial is not necessarily the same as that it dealt with in finding the defendant guilty. Though it may consider evidence previously introduced at the

guilt determination stage, it is not limited to that evidence. Additional evidence in mitigation as well as aggravation may be introduced. Additional argument of counsel is permitted. In short, the nature of the bifurcated trial itself serves to prevent the issue of probable punishment from bleeding over into the determination of guilt or innocence. In so providing, the present North Carolina death penalty statutes recognize not only what Justice Stewart perceived to be society's rejection of the mandatory imposition of the death penalty but also the actual conduct of juries in weighing the guilt or innocence of the accused.

Second, while the present statutes serve to diffuse the issue of jury discretion in the process of guilt determination, they also provide for the exercise of guided discretion at the sentencing stage of the proceeding. After hearing the evidence, arguments of counsel, and further instructions of the trial court judge, the jury is required to deliberate and render a binding sentence recommendation to the court. This recommendation is not presented until the jury has engaged in a two-step process. Initially, the jury must determine which of the aggravating and mitigating circumstances exist on the basis of the evidence presented. If it finds that none of the statutory aggravating circumstances exist beyond a reasonable doubt, the inquiry is at an end and the defendant is sentenced to life imprisonment. If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh any mitigating circumstances in a sufficiently substantial manner so as to call for the imposition of the death penalty. It is this process that overcomes the problem spotlighted in Woodson: a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of a convicted defendant. Furthermore, a mandatory death penalty does not allow the singular characteristics of the conduct found to be criminal to be weighed in the balance in the imposition of sentence as is invariably done in the finding of guilt.

While there is discretion at this stage of the process, it is not discretion that is constitutionally forbidden. It is discretion which is guided by the very language of the statute and the process by which it is implemented. Prior to State v. Waddell, supra, juries had uncontrolled discretion as to the punishment to be imposed in a capital case. A jury then had the power to setence a convicted capital defendant to life imprisonment by so recommending at the time it rendered its verdict. While it is true that the present statute empowers the jury in effect to impose sentence upon the defendant, that decision is not made blindly. No defendant may be sentenced to death unless and until the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt which outweighs any mitigating circumstance in a sufficiently

substantial manner so as to call for the death penalty. No aggravating circumstance which is not provided by the language of the statute may be considered by the jury in imposing sentence. G.S. 15A-2000(e). In this respect, our statute is significantly more narrow than the statute which was upheld in Gregg. The Georgia death penalty statute which was at issue in that case allowed a jury to consider 'any. . . aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . .' Ga. Code Ann. §27-2534.1(b) (Supp. 1975). It is apparent that juries operating under the Georgia procedure have greater discretion in imposing the death penalty than do juries in North Carolina. While the present North Carolina statute enumerates several mitigating factors to be considered by the jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider '[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value.' In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime. (Emphasis added).

It is clear from the foregoing discussion that the present North Carolina death penalty statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence."

The Court further went on to say:

"As a check against the capricious or random imposition of the death penalty, this court is empowered to review the record in a capital case to determine whether the record supports the jury's findings of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d)(2).

We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We,

therefore, decline to exercise our statutory discretion to set aside the sentence imposed."

The Respondent submits that under G.S. §15A-2000 as interpreted and applied by the Supreme Court of North Carolina, the jury is not given unrestrained and unguided discretion in recommending that the defendant be sentenced to death. The Respondent submits that the statute complies with the three general methods of guiding the discretion vested in the sentencing authority under Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976); and Jurek v. Texas, 428 U.S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976). The Respondent submits that G.S. §15A-2000 provides for a bifurcated trial procedure; that the imposition of the death penalty is limited to cases where the sentencing authority finds at least one aggravating circumstance; that the sentencing authority is left free to consider "any other mitigating circumstances" which it may deem to have mitigating value and further, that the sentence of death can only be imposed if the mitigating circumstances do not outweigh the aggravating circumstances. Under G.S. §15A-2000, the sentencing authority has discretion, but it is also guided by clear and objective standards. The Respondent further submits that G.S. §15A-2000 incorporates the third major safeguard against arbitrariness, i.e. the automatic appeal of all death sentences to the Supreme Court of North Carolina and that the court is enjoined by the statute to review each sentence of death and determine: (1) whether the record supports the jury's findings of any aggravating circumstances or circumstances upon which the sentencing authority based its sentence of death; (2) whether the record reveals that the sentence of death was imposed by the sentencing authority under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the record reveals that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

The Respondent submits that the Supreme Court of North Carolina in this case followed the mandate of the statute and determined: (1) that there was sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it; (2) that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factors; and (3) that the sentence of death is not excessive. (Opinion below pp. 14-15).

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari be denied for that: (1) the Petitioner failed to raise a federal question under the United States Constitution at the trial and on his appeal and (2) that the federal question attempted to be presented in the Petition for Writ of Certiorari has been previously determined by this Court and the decision in this case by the North Carolina Supreme Court is in accord with the applicable decisions of this Court.

Respectfully submitted this 17th day of February, 1981.

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APPENDIX A

No. 49 ELEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1980

****

STATE OF NORTH CAROLINA)
)
v.) From Johnston
)
ROBERT HENRY McDOWELL)

****

DEFENDANT APPELLANT'S BRIEF

****

QUESTIONS PRESENTED

WAS ROBERT HENRY McDOWELL MATERIALLY PREJUDICED IN HIS TRIAL BY:

I. FAILURE OF THE COURT TO SUBSTITUTE COUNSEL FROM JOHNSTON COUNTY FOR THE TRIAL OR TO ASSIST IN JURY SELECTION?

II. FAILURE OF THE COURT TO SUPPRESS THE UNCOUNSELED IDENTIFICATION OF ROBERT HENRY McDOWELL THROUGH THE PHOTOGRAPH TAKEN THROUGH THE PAROLE OFFICERS?

III. FAILURE OF THE COURT TO PERMIT AN OPENING STATEMENT?

IV. FAILURE OF THE COURT TO PERMIT JOHN EARL MASON TO TESTIFY CONCERNING CLIFF FERGUSON'S DEATH?

V. FAILURE OF THE COURT TO PERMIT DEFENDANT'S COUNSEL TO CROSS EXAMINE JOHN EARL MASON, PATSY ANN MASON'S FATHER AND CAROL ANN HINSON'S STEP-GRANDPARENT, WITH RESPECT TO LIFE INSURANCE ON CAROL ANN HINSON'S LIFE?

VI. ADMISSION OF THE IDENTITY EVIDENCE BY PATSY ANN MASON OF ROBERT HENRY McDOWELL OVER OBJECTION AND WITHOUT A REQUESTED VOIR DIRE?

VII. THE SUMMARY OF THE EVIDENCE, AS GIVEN BY THE COURT, IN THE INSTRUCTIONS AND THE FAILURE OF THE COURT TO GIVE EVIDENCE FAVORABLE TO ROBERT HENRY McDOWELL, IN THAT DEFENDANT WAS NOT GIVEN EQUAL STRESS WITH THE STATE AND FAVORABLE EVIDENCE OF DEFENDANT WAS NOT GIVEN AND THE LAW ARISING THEREON WAS NOT GIVEN?

VIII. THE COURT EXPRESSING THE OPINION THAT THE DEFENDANT HAD OFFERED NO FAVORABLE EVIDENCE OR ANY EVIDENCE BY CROSS EXAMINATIONS OR OTHERWISE?

STATEMENT OF FACTS

On July 14, 1979, Carol Ann Hinson, age 4, and Patsy Ann Mason, age 14, were living in the house located at 224 Maple Avenue, Sanford, North Carolina, with John and Sarah Mason. John and Sarah are Patsy's parents and Carol's step-grandfather and grandmother, respectively. After playing outside in the yard part of that day and watching some television that night, the two girls went to their bedroom some time after 11:00 P.M. that night leaving John asleep in his bedroom. The Masons' bedroom and the girls' bedroom are separated by two bathrooms. The girls' bedroom has a door leading to a little entryway which has an outside door which opens onto Third Street in Sanford, North Carolina. At some point between 11:00 P.M., July 14, 1979, and 1:00 A.M., July 15, 1979, they heard a knock on the outside door. They went to open it and saw a man standing there. He then came into the bedroom. The man had a big knife in his hand and two pipes with chains on them in his back pocket and stated he had gotten there on a bicycle. After some discussion he stated he was going to rape Patsy. Patsy stated he was not. At some point Carol tried to leave the room, and the man grabbed her and threw her on the double bed in the room. Patsy took Carol in her arms and the man began to hit them with the knife. He then left. Around 1:00 A.M., John Mason woke up and went to check on the girls. He had heard nothing unusual. When he got to the girls' bedroom, he noticed the outside door was open and went over and closed it. When he turned around he saw Patsy sitting on the commode in the bathroom and noticed that she was injured. He ran back to his bedroom and toldhis wife to call the rescue squad. He then went back into

the bedroom and saw Carol at the foot of the bed. There was blood in the bathroom and on the floor. He picked Carol up, went back through the house and out the front door where he met Officers Klomparens and Brown of the Sanford Police Department. Officer Klomparens assisted Mr. Mason in putting Carol in the rescue squad ambulance. He then assisted Officer Brown in helping Patsy to the ambulance.

Patsy and Carol were then taken to Lee County Hospital. Carol was pronounced dead at the hospital, and Patsy was taken to Duke Hospital, Durham, North Carolina, for treatment.

When Robert Henry McDowell, the defendant in this matter, was placed on parole he executed a parole agreement, a condition of which required that Robert "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission." He was, therefore, on July 20, 1979, in technical custody of the N.C. Parole Commission for the reason that all parolees are technically in the custody of said commission.

On Friday, July 20, 1979, Charles Mann, who is employed with the adult division of Probation and Parole, Department of Corrections, and who was the parole officer of Robert Henry McDowell, the defendant in this case, went to Robert's place of employment at Carolina Macomber, Inc., Sanford, North Carolina, and asked Harold Adcock, Robert's supervisor, if he could see Robert. Mr. Adcock brought Robert to see Mr. Mann. Mann told Robert that he needed to have a recent photo of Robert made for his (Mann's) files. Mann told Robert that one or two judges had requested that a recent photo be placed in the file. Robert went down to Mr. Mann's office after he got off work and three photos of him were made, at least one of which showed Robert with his toboggan cap on and one with it off. Previously that day, Friday, July 20, 1979, Mann had had a conversation with Gene Stewart, an agent with the North Carolina SBI during which he learned that Robert was under investigation by the SBI and the Sanford Police Department for the offenses involved in this matter. Stewart asked Mann if he

could look at his file on Robert and did so. After seeing the photo of Robert in the file, Stewart asked Mann if he could get an updated photo of Robert. Mann was aware at the time that the photo was to be used for identification purposes but he did not advise Robert of that. He told Robert only that he needed a photo to update his file. After the photos were taken, Mann turned the camera over to the Sanford Police Department who then developed it. This was different from the normal procedure of Mann sending the film to Fayetteville, North Carolina, to be developed.

After the film was developed, a picture was placed in a manila folder with six other photos of black males and that folder along with another folder with seven photos of black males was taken by Agent Stewart to Duke Hospital on the night of Friday, July 20, 1979. The folder without Robert's photo contained seven photos which were obviously "mug shots" from the files of the Sanford Police Department. The folder with Robert's photo contained seven photos, five of which had the same background and two had varying backgrounds, one of these two being Robert's photo.

Upon arriving at Duke, Agent Stewart went to the room of Patsy Ann Mason. Agent Mary Shepp of the SBI was already there and had been there for quite a while. Agent Stewart instructed Patsy to see if she could point out in the photos in the manila folders the person who had assaulted her. She pointed out the photo of Robert.

On Saturday, July 21, 1979, a search warrant for the premises of Frances Jenkins was obtained by John Walker, who was at that time an agent with the SBI. Robert had been living with Mrs. Jenkins and her two children, a daughter, six, and a son, two, for approximately nine months prior to this incident. The search warrant was executed with the following items being found: ten-speed bicycle, pair of nunchukhs, a machete, a flashlight, black visor cap, pair of check cutoff pants and a pair of men's purple underpants. Blood was found on the machete and visor cap, but it could not be identified as human origin. The visor was at home when Frances returned before Robert came in (R p 51). Human blood was found on the flashlight, but it could not be identified. Robert was arrested on

July 21, 1979 (R p 67). No fingerprints were found of defendant (R p 57).

The case first came on for trial for the November 13, 1979, Term in Lee County, which case ended in a mistrial. The case was then transferred to Johnston County for trial on December 3, 1979. The failure of the Court to appoint Johnston County counsel to try or assist in jury selection is the basis for exceptions. The North Carolina Court of Appeals has been bypassed and both appeals are before the Supreme Court of North Carolina.

ARGUMENTS

I. THE DEFENDANT WAS PREJUDICED BY THE FAILURE OF THE COURT TO APPOINT COUNSEL FROM JOHNSTON COUNTY FOR THE TRIAL OR JURY SELECTION.

ASSIGNMENT OF ERROR 1, EXCEPTION NOS. 1 and 2 (R p 2).

The defendant's counsel were more than 50 miles from home. The case was tried in the District Attorney's county of residence. The District Attorney is a popularly nominated and elected official. This case involved black against Caucasians offenses. The defendant's counsel had no way to plumb empirically or subjectively the attitudes of the panel or the special panel called to try these cases. Effective assistance of counsel involves an awareness of the influences which produce the juror and juror attitude. Counsel and the defendant were strangers. The District Attorney was local, popular and highly regarded. The facts were and are horrible. The jury predictably had no rapport with the defendant or his counsel and they were less credible. A Johnston County jury would have no knowledge of the nuances which surround this case which evidence could not supply. The defendant was convicted on both charges. The black-white relationships and the attitudes of jurors are important herein. Forms, theories and ideas cannot take the place of the awareness which comes from knowledge. It approaches a Fourteenth Amendment Due Process violation to permit the trial without effective assistance of counsel in the jury selection process. It seems that this ought to prejudice enough to warrant a new trial.

II. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO SUPPRESS THE UNCOUNSELED IDENTIFICATION OF ROBERT HENRY McDOWELL THROUGH THE PHOTOGRAPH TAKEN BY THE PAROLE OFFICERS.

(a) ASSIGNMENT OF ERROR 2, EXCEPTION NO. 4 (R p 26).

The Court erred in not allowing defendant's motion to suppress any and all identifications of Robert Henry McDowell through the photographs in that said exclusion is required by the Constitution of the United States and the Constitution of the State of North Carolina, in that the identifications of Robert Henry McDowell came about as a result of a photographic lineup conducted with photographs taken of Robert Henry McDowell, permission for which was not voluntarily given.

Robert Henry McDowell had no choice but to submit to having a photograph of himself taken pursuant to Charles Lee Mann's instructions on July 20, 1979, for the following reasons:

(1) Robert Henry McDowell was on parole at the time of the instruction by Mr. Mann, that is, July 20, 1979. He, therefore, was under the supervision and control of the North Carolina Parole Commission.

(2) A condition of his parole required that Robert Henry McDowell "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission."

(3) A failure to report to his parole officer as instructed would have constituted grounds for his arrest for a parole violation.

(4) According to uncontradicted evidence Robert Henry McDowell was advised by Charles Lee Mann that one or two judges had requested that a recent photograph of parolees be placed in their respective files, when in fact, that was an untrue statement.

(5) Robert Henry McDowell was in technical custody of the North Carolina Parole Commission on

July 20, 1979, for the reason that all parolees are technically in the custody of said commission.

(6) Robert was without counsel when photo was taken, was not advised of any rights to have counsel, did not waive any rights to counsel. Further, Robert Henry McDowell was under investigation at the time the photograph was obtained.

(b) ASSIGNMENT OF ERROR 3, EXCEPTION NO. 5 (R p 26)

By being in custody and under the supervision and control of the North Carolina Parole Commission, a law enforcement-related body, and being under investigation for a capital crime, Robert Henry McDowell was therefore entitled to counsel under the 4th, 6th and 14th Amendments of the Constitution of the United States before, during and after he was instructed by Charles Lee Mann to report and have his photograph made; that he was not advised of any said rights and had no counsel present and therefore all identifications resulting from or connected with said photograph should be disallowed.

STATE v WILLIAMS, 279 NC 663, 185 SE 2d 174 (1971), page 668, provides:

> "Rules established for in-custody confrontation for identification purposes required that: (1) the accused be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation be excluded; (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation be likewise excluded unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. Failure to observe these rules is a denial of due process." STATE v SMITH, 278 NC 476, 481, 180 SE 2d 7, 11 (1971), and cases cited.

Accord: STATE v HARRIS, 279 NC 177, 179-80, 181 SE 2d 420, 421 (1971).

(c) ASSIGNMENT OF ERROR 4 and 5, EXCEPTIONS NOS. 6 and 7 (R p 26).

The State would contend that the photo was to update the file of the parole officer. If that be the case, why did they need three or more pictures taken? It was also obvious that Robert Henry McDowell was a suspect and under investigation in that when the pictures were taken the Sanford Police Department immediately developed the film rather than let Mr. Mann process it through normal channels.

There is no evidence here that Robert Henry McDowell was duly advised that he had a right to have an attorney present at any lineup for identification purposes or that he was duly advised that he had a right to appointment of counsel in the event of indigency or that he ever waived those rights. It is contended, therefore, that Robert Henry McDowell was denied his right to counsel under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States and the law of the land clause of the Constitution of North Carolina.

(d) ASSIGNMENT OF ERROR 6, EXCEPTION NO. 8 (R p 27)

Robert Henry McDowell did not voluntarily submit to having his picture made. He did not know it was for identification purposes. The State has not shown that he has waived his Fourth, Sixth and Fourteenth Amendment rights under the United States Constitution to that photograph and its use. STATE v ACCOR, 277 NC 65, 175 SE 2d 583 (1970), requires such and requires the State to establish this by the evidence. The State has not and the findings in the suppression Order do not conclude that it has nor do they support the conclusions that it has (R p 26). The second appeal in STATE v ACCOR, 281 NC 287, 188 SE 2d 332 (1972), does not change this holding, it emphasizes that such findings as voluntariness, the establishment of waiver and the independent basis must be shown.

The person of Robert Henry McDowell is a suppressable fruit of official misconduct. This is the reserved

question in Part 11-D of U.S. v CREWS, US #78-777-48 LW 4324 (March 25, 1980), in the majority opinion. The identification should have been suppressed.

All relevant arguments on all phases of this suppression are incorporated in each assignment by reference.

III. ROBERT HENRY McDOWELL WAS PREJUDICED BY NOT BEING PERMITTED TO MAKE AN OPENING STATEMENT.
ASSIGNMENT OF ERROR 7, EXCEPTION NO. 9 (R p 27).

GS 15A-1221 sets out the order of proceedings in a jury trial. Subsection (4) provides that each party must be given the opportunity to make an opening statement. The defendant did not have this opportunity. It is mandatory jurors in the selection process come to the defendant in a capital case only after they are death qualified. This procedure gives the defendant a chance to offset and counteract the discussions by the Court and the State. That the Court did not afford the defendant this right or required the defendant to ask for it and such puts the defendant at a disadvantage and is therefore prejudicial. North Carolina General Statute 15A-1221(4) clearly affords to the defendant the right to make an opening statement, and that right was effectively denied in this case. This denial was an error of law resulting in prejudice to defendant in that he had no opportunity to apprise the jurors about the case from his point of view and what to look and listen for on behalf of defendant.

IV. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO PERMIT JOHN EARL MASON TO TESTIFY CONCERNING CLIFF FERGUSON'S DEATH.
ASSIGNMENT OF ERROR 8, EXCEPTION NO. 12 (R p 31).

Mr. Mason had testified his wife called Cliff to see where Terry was. Terry was the mother of the deceased child (R p 30). He testified that he was a friend Terry "knowed". When defendant tried to establish that he was murdered the next day, the State's exception was sustained. This was the person Mr. Mason was to call if Terry was needed (R p 31). From the response in the absence of the jury, it

appears that Mr. Ferguson was a black man who was dead. Mr. Mason heard of his death the Sunday night after the death of Patsy (actually Carol) (R p 33). The coincidence of both deaths, the facts of the connection with the mother of the deceased in both instances were relevant and material facts to be presented in the case. Such would give the jury a picture of the people and make it aware that they were in the orbit of violence and violent activity. Why that night the mother would have left word is an interesting speculation. The same officers investigated both deaths. The matters were connected in fact. There was a nexus in Terry Hinson, mother of Carol. This was a legitimate area of inquiry and the jury should have been permitted to hear this evidence and draw conclusions or blanks from it. It seems that there is no prejudice implicit in the answer to a party, only the State's case. It should be competent to show that one closely connected was killed violently. Its weight and effect was for the jury. See 1 Stansbury's NORTH CAROLINA EVIDENCE, Secs. 77, 78 and 79 (Brandis rev. 1973).

V. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO PERMIT DEFENDANT'S COUNSEL TO CROSS EXAMINE JOHN EARL MASON, PATSY ANN MASON'S FATHER AND CAROL ANN HINSON'S STEP-GRANDPARENT, WITH RESPECT TO LIFE INSURANCE ON CAROL ANN HINSON'S LIFE.

ASSIGNMENT OF ERROR 9, EXCEPTION NO. 13 (R p 32).

This inquiry was to determine who, if anyone, would profit from Carol Ann Hinson's death. Mr. Mason, as a step-grandparent, did not have an apparent insurable interest in Carol's life (R p 30). 7 NC Index 3d Insurance, Section 12. The 4-year-old child likely did not insure herself in Mr. Mason's favor. According to Mr. Mason, he was on the scene at the house. According to his testimony, in the absence of the jury, the insurance on Carol Ann Hinson's life paid him $5,000.00 (R p 33). This would appear relevant on the question of Mr. Mason's possible motive or intent. See 1 Stansbury's NORTH CAROLINA EVIDENCE, Sec. 83 (Brandis rev. 1973). This warrants a new trial.

VI. ROBERT HENRY McDOWELL WAS MATERIALLY PRE-

JUDICED BY THE ADMISSION OF THE IDENTITY EVIDENCE OVER OBJECTION AND WITHOUT A REQUESTED VOIR DIRE.

ASSIGNMENT OF ERROR 10, EXCEPTION NO. 20 (R p 42); EXCEPTION NO. 21 (R p 42); EXCEPTION NO. 22 (R p 43); EXCEPTION NO. 23 (R p 43); EXCEPTION NO. 24 (R p 43); EXCEPTION NO. 25 (R p 43); EXCEPTION NO. 26 (R p 44); EXCEPTION NO. 27 (R p 44).

It is important to note at the outset that Patsy Ann Mason did not testify at the Suppression Hearing (R pp 7-21). There is no finding or testimony as to the time she was in the presence of her assailant, the light in the room, any identifying characteristics, acquaintance and other relevant, factual and constitutional matters with respect to her identity testimony. No chance was afforded defendant to determine her acquaintance with any or all of the black males whose photographs appeared in the two manila folders which were prepared with the defendant's picture and the pictures of 13 others. When she began her testimony in this regard the defendant objected and specially requested that counsel be allowed to voir dire, EXCEPTION 23 (R p 43). By the various objections which constitute ASSIGNMENT 10 defendant objected to the identification evidence, requested the voir dire and moved to strike the identifications which were made of the defendant. This failure to permit the voir dire and the failure to find the facts with respect to the identification and the constitutional rights of the defendant is error justifying a new trial. This is a capital case which would require pursuant to STATE v WADDELL, 289 NC 19, 220 SE 2d 293 (1975), an inquiry if the exceptions were not taken. This proposition has recently been treated at large in STATE v ACCOR AND MOORE, 277 NC 65, 175 SE 2d 583 (1970), which provides on p 79:

> "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a voir dire or asks for an opportunity to 'qualify' the witness, such voir dire should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identification by a witness

is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence ...."

There does not appear, in this case, to be any independent basis for identification.

VII. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE SUMMARY OF THE EVIDENCE, AS GIVEN BY THE COURT, IN THE INSTRUCTIONS, AND THE FAILURE OF THE COURT TO GIVE EVIDENCE FAVORABLE TO ROBERT HENRY McDOWELL, IN THAT DEFENDANT WAS NOT GIVEN EQUAL STRESS WITH THE STATE AND FAVORABLE EVIDENCE OF DEFENDANT WAS NOT GIVEN AND THE LAW ARISING THEREON WAS NOT GIVEN.

ASSIGNMENT OF ERROR 13, EXCEPTION NO. 59 (R p 84); ASSIGNMENT OF ERROR 15, EXCEPTION NO. 61 (R p 95); ASSIGNMENT OF ERROR 16, EXCEPTION NO. 62 (R pp 95-96); ASSIGNMENT OF ERROR 17, EXCEPTION NO. 63 (R p 96).

The summary of evidence set forth on Page 84 of the Record, the subject of EXCEPTION 59, was presented as the evidence necessary to explain the law of the case (R p 78). This summary does not contain the fact that there were no bloodstains on the bicycle, the nunchukhs, on the men's undershorts; that there were none of defendant's fingerprints in the room where the attack took place; that Patsy Ann Mason wore glasses from the first grade to the seventh grade; that a sketch was made of the alleged assailant that was never offered by the State; that the nunchukhs that were State's Exhibit 8 were not the ones her assailant had (R p 48); and that the sun visor cap was on the freezer when Frances Jenkins returned home, which was before Robert returned home on the night in question (R p 51). These and other facts were raised by cross examination. It is the clear teaching of STATE v SANDERS, 298 NC 512, 259 SE 2d 258 (1979), that the failure "... to summarize, at all, evidence favorable to the defendant ... violates the clear mandate of the Statute which

requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given the State and the defendant." The failure to summarize evidence which raised inferences favorable to the defendant elicited on cross examination in that case was deemed prejudicial error to the defendant. To the same effect is STATE v HEWETT, 295 NC 640, 247 SE 2d 886 (1978), which also held that GS 15A-1232 restates in substance GS 1-180 which required the judge to (1) declare and explain the law arising on the evidence; (2) to state evidence necessary to explain the application of the law thereto, and (3) give equal stress to the State and defendant in a criminal action. STATE v SANDERS, supra. This statute creates a substantial legal right; its provisions are mandatory; and a failure to comply with them is prejudicial error for which a new trial must be ordered. STATE v HEWETT, supra.

VIII. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED BY THE COURT EXPRESSING THE OPINION THAT THE DEFENDANT HAD OFFERED NO FAVORABLE EVIDENCE OR ANY EVIDENCE BY CROSS EXAMINATION OR OTHERWISE.

ASSIGNMENT OF ERROR 14, EXCEPTION NO. 60 (R pp 92-93).

This instruction clearly says the defendant "... has not elected to offer evidence and his decision not ... to offer evidence will create no presumption of any kind against him. 'Therefore, you must be very careful in your deliberations not to let the defendant's election to not ... offer evidence influence your decision in any way whatsoever.'" This instructs the jury that the defendant has not offered by cross examination or from the State's evidence any evidence. STATE v SANDERS, supra, declares that such is an acceptable and recognized way of producing evidence and more certainly perceives and depicts the role of counsel. This seems a clear violation of GS 15A-1222 which prohibits the expression of opinion by the judge in the presence of the jury of any fact to be decided by the jury. The language is not the charge as set in the Standard Criminal Jury Instructions and while such is not exclusive, it is persuasive. The charge, as given, is certainly not the one contemplated to

satisfy GS 8-54 which speaks only as to defendant's election not to give testimony. This expression of opinion warrants a new trial.

The defendant respectfully requests the Court to review the entire proceedings to determine if prejudicial error appears, and, if some does, to afford the defendant appropriate relief.

CONCLUSION

Wherefore, defendant prays that the denial of assistance from Johnston County at his trial, the failure to suppress the identification obtained through official misconduct, the failure to permit an opening statement by defendant's counsel, the failure of the Court to permit inquiries concerning Cliff Ferguson's death, or to cross examine John Earl Mason as to his receiving funds from Carol Ann Hinson's death, the admission of the identification of Robert Henry McDowell over an objection and without a requested voir dire, the failure of the Court to state the evidence favorable to the defendant, to give the law arising thereon and to give equal stress to defendant and plaintiff, and the expression by the Court of an opinion as to whether defendant offered evidence, or such as may appear, be found error and warrant and justify, a retrial on the guilt phase of this case.

Respectfully submitted, this 20th day of May, 1980.

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